

1989

Brent C. Hill, Audrey Hill, Russell W. Mangum, Carole Mangum, and Hill Mangum Investments v. Seattle First National Bank : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

890375

IN THE SUPREME COURT FOR THE STATE OF UTAH

BRENT C. HILL, AUDREY HILL,
RUSSELL W. MANGUM, CAROLE
MANGUM, and HILL MANGUM
INVESTMENTS, a Utah general
partnership,

REPLY BRIEF

Plaintiffs/Appellants,

vs.

Docket No. 890375

SEATTLE FIRST NATIONAL BANK,

Defendant/Respondent.

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Michael Murphy

Argument Priority Classification 16

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Clerk, Supreme Court, Utah

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Defendant/Respondent.

Plaintiffs/Appellants (hereinafter "Hill Mangum") submit the following brief in reply to the brief filed by Respondent Seattle First National Bank (hereinafter "Seattle First").

SUMMARY OF ARGUMENT

Hill Mangum contends that there was sufficient evidence presented below to create a question of material fact with regards to the summary judgment awarded on Plaintiffs' Fourth Cause of Action. In its opposing brief, Seattle First claims that the Plaintiffs failed to identify specific facts regarding the offers which were submitted to Seattle First for financing and as a result, it is entitled to prevail under Rule 56(e) of

the Utah Rules of Civil Procedure.

The difficulty encountered by Plaintiffs in setting forth specific names and dates is that the documents which contain that information were turned over to Seattle First and Plaintiffs failed to keep copies of them. This record keeping error alone should not be allowed to thwart Plaintiffs' efforts to demonstrate a question of material fact.

ARGUMENT

Seattle First included two additional issues which need to be addressed in this reply brief.

I. PLAINTIFFS SUBMITTED SUFFICIENT FACTS TO REBUT THE CLAIM BY SEATTLE FIRST THAT ONLY ONE PRESENTATION OF INDIVIDUAL FINANCING WAS PRESENTED TO THEM.

The first issue which Seattle First raises is:

Should the court's summary judgment in favor of Seattle First as to the Fourth Cause of Action of the Complaint be sustained where Plaintiffs alleged that Seattle First failed to provide financing to individual condominium buyers, where it is uncontroverted that Seattle First received only one presentation from Plaintiffs for individual condominium owner financing which did not meet Seattle First's lending guidelines?

This statement of the issue mischaracterizes the record below. It was established by affidavits that eighteen (18) offers from potential condominium purchasers were submitted to Seattle First by Hill Mangum or their agents. While it is true that Plaintiffs have not been able to tie these offers to specific dates, there is sufficient evidence that a number of those offers were sent to Seattle First subsequent to the meeting in Seattle, Washington, in March of 1984.

Specifically, the second Affidavit of J.R. Boswell reads in relevant part:

4. On or about March of 1984, I travelled to Seattle First National Bank with Russell W. Mangum to talk to Al Espy, Vice President in Seattle offices of Sea First. Russell Mangum and I met with Al Espy and Sherril, an assistant. Mr. Espy promised to provide financing for all unsold units and directed me to accept applications and forward them to him (Al Espy) for approval and funding of the loans. At this meeting, Russell Mangum requested individual financing. At this meeting, Mr. Espy directed Russell Mangum to change marketing agents and sales strategies....

7. Following the meeting in Seattle with Mr. Espy, Ned Fox of Hill Mangum provided a number of applications to me to send to Al Espy. On these applications I never received a decision.

Plaintiffs argued below that the offers were sent to Espy and that copies were not retained by them or their agents. Consequently, they are unable to offer exact proof of the dates that these offers were submitted or the names of the individuals seeking financing.

The second Affidavit of Ned R. Fox (the real estate broker responsible for marketing the Garden Tower Condominiums) also states that he forwarded eighteen (18) offers to purchase to Al Espy at Seattle First from May, 1983, until late 1987:

3. During the time he was selling Garden Towers Condominiums he received at least 18 offers to purchase individual units, all of which were presented to Al Espy, Vice President of Sea First National Bank for approval and financing. All copies were provided to Al Espy and I retained no copies for Hill Mangum Investment. (emphasis added)

Contrary to the statement of Seattle First, the testimony of these two individuals does contradict the statement by Al Espy

that he received only one presentation for individual financing from the Plaintiffs.

As this is an appeal from a summary judgment awarded below, it is acknowledged that this court must view all the facts presented in a light most favorable to the losing party below. Blue Cross and Blue Shield v. State, 779 P. 2d 634, 636 (Utah 1989); English v. Kienke, 774 P.2d 1154 (Utah Ct. App. 1989). While the lack of documentation and the passage of time have made it difficult for the Plaintiffs to submit affidavits which are more specific, the testimony of these two individuals creates a genuine issue of material fact which should have precluded an award of summary judgment.

II. THE AFFIDAVITS SUBMITTED ON PLAINTIFFS' BEHALF ESTABLISHED THAT THERE WAS AT LEAST ONE BREACH OF AN ORAL AGREEMENT TO PROVIDE INDIVIDUAL FINANCING AFTER MARCH, 1984.

Seattle First also sets forth another issue in its brief which should be addressed herein:

4. Further, should the court's summary judgment as to the fourth cause of action be sustained because plaintiffs failed to file any affidavits that attest that a breach of an oral agreement to provide individual condominium owner financing occurred within four years of the filing of the complaint and the claim is, therefore, barred by the applicable statute of limitations, Utah Code Annotated 78-12-25?

Again, affidavits were filed by the Plaintiffs which address this issue. The record demonstrates that Al Espy promised on behalf of Seattle First to provide financing for individual purchasers of Garden Towers Condominium units and that this promise was made in March of 1984. There is further testimony

that offers were submitted to Espy subsequent to this time and that by failing to respond to those offers, Espy breached his promise to the Plaintiffs.

While the lack of documentation in Plaintiffs' possession makes it difficult to assign exact dates to these breaches, they necessarily occurred within four (4) years prior to the filing of this action in November of 1987. Ned R. Fox states in his second Affidavit:

4. Mr. Al Espy, Vice President of Seattle First National Bank at a meeting at Garden Towers Condominiums in Salt Lake City in August of 1983, at which Al Espy, Jim Boswell, Brent Hill, Mike Lawrence and I were in attendance, directed me to present all the offers to purchase directly to him for approval and agreement. He stated to me that he had all authority in any decision concerning the Garden Towers Condominiums. He promised financing of all sales I would present, however, Sea First never responded to the applications. (emphasis added)

J.R. Boswell's testimony on the presentation of these offers to Al Espy is set forth in Point I and is further supported by the Third Affidavit of Russell W. Mangum which reads in relevant part:

16. Because it appeared that our loan applications for long term financing were being ignored, Jim Boswell and I went to Seattle to talk to Al Espy on or about March of 1984. In Seattle offices of Sea First, we (Boswell and I) met with Al Espy and Sherril, an assistant. Mr. Espy promised to provide financing for all unsold units and directed Mr. Boswell to accept applications and forward them to him (Mr. Espy) for approval and funding of the loans. (emphasis added)

The promises of Mr. Espy occurred in August of 1983 and March of 1984 and Plaintiffs relied upon those promises by

forwarding offers to him subsequent to those dates. Mr. Espy's breach of his promises occurred when he failed to respond with financing or otherwise to the offers he received from Plaintiffs.

The Complaint in this action was filed in November of 1987 and the affidavit evidence establishes that the oral contract which was breached by Seattle First was entered into in August of 1983 and March of 1984. Plaintiffs' claim for breach of that contract was timely filed under the applicable four-year statute of limitations. §78-12-25 Utah Code Ann. (1953 as amended).

III. THIS APPEAL IS GROUNDED ON A REASONABLE FACTUAL AND LEGAL BASIS.

The "facts" established by Seattle First were clearly controverted by the Plaintiffs. Plaintiffs have referred this court to affidavit testimony which raises genuine issues of material fact which should have precluded an award of summary judgment to the Defendant. The controverted material facts in the record below are a reasonable factual and legal basis under Rule 56 of the Utah Rules of Civil Procedure for this appeal.

The claim by Seattle First that this appeal was filed to harass it and increase the cost of litigation is completely unfounded. The individual Plaintiffs surely cannot afford to throw away their hard earned money on an appeal designed to harass Seattle First. The sole reason for this appeal is to

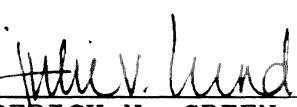
employ an available judicial process to reverse a summary judgment entered in favor of Seattle First and against the Plaintiffs by Judge Michael Murphy.

CONCLUSION

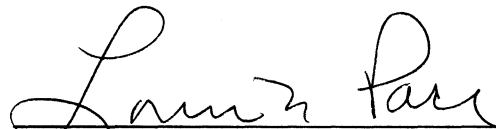
Hill Mangum seeks to have this court overturn a summary judgment entered in favor of Seattle First on the basis that there are a number of material facts which should have precluded a summary judgment. In addition, the doctrine of collateral estoppel was erroneously applied by the trial court in deciding that the Defendant was entitled to summary judgment. This appeal has a reasonable basis in fact and law and was filed for the sole purpose of having this court review the decision of the trial court.

DATED this 3rd day of August, 1990.

GREEN & BERRY


FREDERICK N. GREEN
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Attorneys for Plaintiffs/
Appellants

DATED this 4 day of August, 1990.

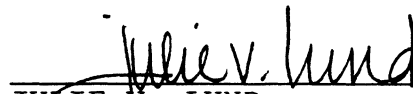

LORIN N. PACE
Co-Counsel for Plaintiffs/
Appellants

CERTIFICATE OF SERVICE

COMES NOW Julie V. Lund, attorney for the
Plaintiffs/Appellants in the above-entitled action, and hereby
certifies that she has served the Defendant/Respondent with a
Reply Brief by mailing four (4) true and correct copies thereof
to Cullen Battle of the firm of Fabian & Clendenin, attorneys for
Defendant/Respondent, at 215 South State Street, Salt Lake City,
Utah 84151, on this 6th day of August, 1990.

DATED this 6th day of August, 1990.

GREEN & BERRY



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Appellants